PRIVY COUNCIL REPORTS

NEO TAI KIM v. FOO STIE WAH

[P.C. (Lord Fraser of Tulleybelton, Lord Wilberforce, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Brightman) January 16, 17 and March 4, 1985]
[Privy Council Appeal No. 30 of 1982]

Trust – Husband and wife – Presumption of advancement.

Family Law – Husband and wife – Share in business – Property in wife's name – Presumption of advancement.

Family Law – Husband and wife – Matrimonial home – Common intention.

This was an appeal from the decision of the Court of Appeal of Singapore reported in [1982] 1 M.L.J. 170. The case concerned the beneficial ownership of six houses and a business which were placed in the name of the wife at the instance of or with the concurrence of the husband. The trial judge held that one house purchased as the matrimonial home and also the business belonged beneficially to the wife alone, but that the remaining five houses were owned beneficially by the husband and the wife in equal shares. The Court of Appeal reached the same conclusion. The husband appealed in relation to the former matrimonial home and the business seeking to reduce the wife's share to one-half. The wife cross-appealed in relation to the five houses, seeking to increase her half-share to absolute ownership of the whole.

Held: (1) the trial judge had found as a fact that there was a common intention that the property known as 44 One Tree Hill should be bought for the wife as the matrimonial home, which in the context of the judgment of the trial judge meant for the wife beneficially as the matrimonial home. This common intention by itself established the beneficial ownership and precluded the operation of any presumption of advancement;

(2) the presumption of advancement is not an immutable rule to be applied blindly where there is no direct evidence as to the common intention of the spouses. It is rather a guideline to be followed by the court in an appropriate case when it searches for the intention, which ought in the absence of evidence to be imputed to the parties;

(3) in this case the trial judge, with his knowledge of local conditions, considered it inappropriate to apply the presumption of advancement in relation to the five properties in dispute and so did the Court of Appeal. The Privy Council accepted as correct the opinion of the trial judge and the Court of Appeal that the circumstances of this case were not appropriate for the application of the presumption of advancement so as to vest the entire beneficial interest in the five properties to the wife;

(4) in regard to the business the learned judge came to the conclusion that there was a common intention that the wife should be the sole owner of the business. The Privy Council saw no sufficient reason to question the inference drawn by the trial judge as to the intention of the husband and the wife when she was set up in the business.

Cases referred to:–

(1) *Nixon* v. *Nixon* [1969] 1 W.L.R. 1676.
(2) *Re Cummins* [1972] Ch. 62.
(3) *Pettitt* v. *Pettitt* [1970] A.C. 777, 814, 824.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

David Gardam Q.C. (*Howard Cashin* with him) for the appellant.

John Chadwick Q.C. (*M.L. Kullepetis* with him) for the respondents.

Cur. Adv. Vult.

Lord Brightman (delivering the Judgment of the Board): This appeal from the Court of Appeal in Singapore concerns the beneficial ownership of six houses and a business which were placed in the sole name of Foo Stie Wah ("the wife") at the instance of or with the concurrence of Neo Tai Kim ("the husband"). The trial occupied some six weeks. The trial judge held that one house, purchased as the matrimonial home, and also the business belonged beneficially to the wife alone, but that the remaining five houses were owned beneficially by the husband and the wife in equal shares. The Court of Appeal reached the same conclusion. The husband appeals in relation to the former matrimonial home and the business, seeking to reduce the wife's interest to a half-share. The wife cross-appeals in relation to the five houses, seeking to increase her half-share to absolute ownership of the whole.

The parties were married in 1951 according to Chinese rites. They established their matrimonial home in rented accommodation. In 1954 the husband took a second wife, and established a second matrimonial home. In 1974 the husband and his first wife separated.

At the time of his first marriage the husband was employed as a clerk in an import-export firm. Shortly thereafter he became engaged on his own account in various hotel, catering and canteen businesses. In 1960 he took over the catering service at the Paya Lebar International Airport, where he operated under the name of the International Airport Restaurant. In June 1962 he became the sole proprietor of the Shamrock Hotel, in which he had previously been interested as a partner. The learned trial judge found that the wife was "a working wife", and ran the canteen and the International Airport Restaurant for the husband: accordingly, on the authority of such cases as *Nixon* v. *Nixon*[1] and in *Re Cummins*[2], the judge found that the wife was beneficially entitled

to a half-share in such businesses. This finding is not challenged by the husband. The wife also ran a small business on her own account at the airport as a "sideline".

No. 44 One Tree Hill

This was the first property in issue to be purchased. It was conveyed into the sole name of the wife by a deed dated July 31, 1963. It was the matrimonial home until 1972. The purchase price was $39,360, of which the sum of $19,360 was paid in cash and $20,000 borrowed on mortgage from a bank.

After the breakdown of the marriage the husband and the wife each claimed to be the absolute owner of this house. The husband asserted that he had paid the whole purchase price and paid all the mortgage instalments out of his own money, and that therefore the wife held the house in trust for him absolutely. The wife asserted that she had paid for everything out of her savings from her "sideline" business at the airport. An action was started by the wife against the husband in December 1976 (No. 3999 of 1976) in which the beneficial ownership of the house was put in issue. The trial of this action, and of the other two actions which were heard at the same time, began at the end of 1979 and was concluded in the following year. The findings of the learned trial judge in relation to this house were as follows:–

"I find that the intention of the parties at that time was to purchase this house for the (wife) as the matrimonial home. The probabilities are that the mortgage instalments were paid out of the funds of the International Airport Restaurant and Emerald Room. The (husband) has no documentary evidence to prove that he paid any instalments or anything.

I find that No. 44 One Tree Hill is not held by the (wife) in trust for the (husband) and that it is her property."

The Emerald Room was a restaurant and nightclub which had been opened, some time after the purchase of the matrimonial home, in a part of the Shamrock Hotel. The wife ran the business for the husband. The judge found that she was entitled to an equal share therein. This finding is not challenged by the husband.

The husband appealed against the judge's decision that the wife was the absolute beneficial owner of No. 44 One Tree Hill. His appeal failed. The Court of Appeal, after setting out the judge's finding as to the intention of the parties when the house was bought, and his decision that the house was not held by the wife in trust for the husband but was the wife's property, said that "on the evidence before the learned trial judge we are of the view that he did not err in law in so finding". The Court of Appeal went on to observe that although a purchase of property in the name of another gave rise to a resulting trust in favour of the purchaser in the absence of a common intention to the contrary, nevertheless if the purchaser were the husband and the grantee the wife, "the doctrine of the presumption of advancement comes into play on behalf of the wife to negative the resulting trust in favour of the husband". Their Lordships respectfully observe that it was not appropriate for the Court of Appeal to pray in aid the doctrine of presumption of advancement. The trial judge had found as a fact, with which the Court of Appeal agreed, that there was a common intention that the house should be bought "for the wife as the matrimonial home". which in the context of the judgment of the trial judge meant "for the wife beneficially as the matrimonial home". This common intention by itself established the beneficial ownership and precluded the operation of any presumption.

No. 42 Mount Sinai Avenue
No. 56 Mount Sinai Drive

These were the next two purchases. The contracts were made in June 1965 over the signature of the wife. The purchase price was discharged by instalments paid in cash to the developers. Completion took place on July 1, 1971, the properties being transferred into the sole name of the wife. The wife again asserted that she had paid the instalments out of savings from her "sideline" business at the airport, and claimed absolute ownership. The husband asserted that he had paid for the properties out of money from his businesses and he likewise claimed to be the absolute owner. The beneficial ownership of these properties was put in issue in an action (No. 3744 of 1976) started by the wife shortly before the One Tree Hill action. The learned trial judge found that:–

"The probabilities are that there was no conversation as to the beneficial ownership of these properties . . . The probabilities are that the instalments for these properties were paid out of the funds of the International Airport Restaurant and the Emerald Room and from the rents collected."

He held that the wife, being entitled to an equal share in the profits of these businesses, was entitled to an equal share in the properties.

No. 2 Grove Lane
No. 36 Belmont Road
No. 19 Jalam Mariam

These properties were bought in 1970, 1971 and 1972 respectively in the name of the wife. The wife claimed that they were bought with the funds of the Emerald Room business and were expressly intended for her sole beneficial use. The husband claimed that the properties were bought out of his own funds. The beneficial ownership of the Belmont Road property was put in issue in the One Tree Hill action, while the beneficial ownership of the other two properties was put in issue in an action begun by the husband against the wife in 1977 (No. 637 of 1977).

The learned trial judge accepted the wife's evidence that the purchase of these three properties was financed from the funds of the Emerald Room business in which the spouses had equal interests, but not that there was an oral trust in favour of the wife. As the purchases were made out of such jointly owned funds, the spouses were entitled to the properties in equal shares.

The parties accept the decision of the learned trial judge as to the source of the funds used for the purchase of the five properties last mentioned, and the husband accepts that the wife is entitled to a half-share therein. The only question argued before their Lordships was whether the wife was entitled to the whole beneficial ownership. The beneficial ownership of the five properties was dealt with by the Court Appeal as a single issue, and can now be considered by their Lordships under the one heading.

The five properties

As already indicated, the husband accepts that the wife was entitled to an equal share in the profits of the International Airport Restaurant and the Emerald Room, and accordingly he does not seek to vary the learned trial judge's finding that he and the wife were beneficially interested in the five properties in equal shares. The wife cross-appealed both before the Court of Appeal and before the Board, claiming that she was absolutely entitled to the whole beneficial interest in the five properties as a result of the operation of the presumption of advancement. The Court of Appeal accepted that there was no direct evidence of any common intention, but as the properties were bought out of the assets of business in which they were equally interested, they considered that the presumption of advancement which would otherwise have arisen and operated to give the wife an absolute beneficial interest in the whole was rebutted. The Court held that the parties were therefore tenants in common of the properties in equal shares.

Counsel for the wife placed before their Lordships a powerful argument that as the presumption of advancement would have applied if the husband had been the sole provider of the purchase money, there was no logical reason for reaching a different conclusion because the purchase money was provided by both spouses.

The nature of the presumption of advancement is accurately stated in *Snell's* Principles of Equity, 27th Edition, pages 176 *et seq.*, under the distinguished editorship of Sir Robert Megarry V-C. "This presumption of advancement, as it is called, applies to all cases in which the person providing the purchase-money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed. [*e.g.*] where the former is the husband or father of, or stands in *loco parentis* to, the latter... Accordingly, if a man buys property and has it conveyed to his wife... *prima facie* this is a gift to her ... However, under modern conditions, with the reduction in the wife's economic dependence on her husband, the force of the presumption is much weakened..." The qualification expressed in the final sentence of this quotation reflects views which had been expressed four years earlier by Lord Diplock in *Pettitt* v. *Pettitt*[3], at page 824. Sir Robert Megarry rightly referred to "this presumption of advancement, as it is called" because, as Lord Upjohn pointed out in *Pettitt* v. *Pettitt* at page 814, "it is no more than a circumstance of evidence which may rebut the presumption of resulting trust", *i.e.* a trust resulting to the husband if he is the provider of the money. In a case such as the present, where both spouses are the providers of the money, it is no more than a circumstance of evidence which may rebut the inference that they are equally interested.

In the opinion of their Lordships the presumption of advancement is not an immutable rule to be applied blindly where there is no direct evidence as to the common intention of the spouses. It is rather a guideline to be followed by the court in an appropriate case when it searches for the intention which ought, in the absence of evidence, to be imputed to the parties. It is proper for the trial judge to review the background of the case and to decide in appropriate circumstances that the guideline is

not one which can sensibly be followed in the case before him. In the instant case the trial judge had to consider the affairs of a Chinese family and the legal effect of the purchase of a number of houses out of the funds of businesses in which they were equal partners. The trial judge, with his knowledge of local conditions, considered it inappropriate to apply the presumption of advancement to such a case, and so did the Court of Appeal. The view taken by the trial judge and the Court of Appeal in Singapore as to what is appropriate to a case concerning the local Chinese community ought not to be disturbed by their Lordships. Their Lordships therefore accept, as correct, the opinion of the trial judge and of the Court of Appeal that the circumstances of the present case were not appropriate for the application of the presumption of advancement so as to vest the entire beneficial interest in the five properties in the wife.

Skillett's Coffee House

The husband and the wife, predictably, each claimed exclusive ownership of this business and of the lease of the premises upon which the business was conducted. The issue formed part of the subject matter of the Mount Sinai action.

The learned trial judge accepted the evidence of the wife, which was to the following effect. Early in 1970 the wife expressed a wish to "run a coffee house", and the husband agreed that she should do so. The trial judge's note of her evidence continues as follows:—

"He (the husband) said since we had operated a restaurant it was advisable to run a coffee house under my name; I also told him we were getting old and the business of the coffee house might be run by our children when they grew up."

The husband paid $30,000 as a "booking fee" and negotiated a lease of a part of Supreme House, Penang Road, then under construction. The lease was granted to the wife as sole lessee. Ronnie Tan, the wife's nephew, helped her to establish the venture. Some $200,000 were spent on fitting up and furnishing the coffee house. It was called "Skillets", this being a business name registered by the wife. It was opened in September 1971. The money for the venture came from the business of the Emerald Room, and from the wife's savings. The wife thereafter ran the coffee house, working both there and at the Emerald Room. The husband took no part in the running of the business, except external matters such as renewing the licence. The two Mount Sinai properties were mortgaged by the wife in connection with the business, but the venture was very successful and borrowed money was not needed. The keys of the safe were kept by the wife until the husband forcibly removed them from her. The business banking account was opened by the wife in her own name. The income tax returns on the business were rendered by the wife.

In 1975, after the husband and wife had separated, the husband's brother represented to the Registrar of Business Names that the wife was "the proprietress" of the business, although the husband declared that he was unaware of this. On these primary findings of fact the learned judge came to the conclusion that there was a common intention that the wife should be the sole owner of the business.

Their Lordships understand the Court of Appeal to have accepted all the judge's conclusions except that the initial finance came from the Emerald Room and the wife's savings. They said this:—

"On the whole of the evidence before the Court the learned trial judge was entitled to make the findings he did. However, it seems to us that on the question of who provided the money for commencing the business of the coffee house his finding, that it was paid out of the business of the Emerald Room and from the savings of the (wife), is against the evidence. In our view the evidence before the trial court points to the (husband) having provided the monies for the commencement of the business out of his own funds."

The judgment of the Court of Appeal does not analyse the evidence, and their Lordships are unsure of the Court's particular reasons for rejecting the trial judge's finding as to the source of money. With great respect to the Court of Appeal, their Lordships venture to doubt whether the Court was correct in overturning the trial judge's finding. The Court of Appeal nevertheless reached the same conclusion as the trial judge, on the footing that the presumption of advancement operated in favour of the wife. As however the trial judge had come to the conclusion, which their Lordships understand to have been concurred in by the Court of Appeal, that it was the common intention of the parties that the wife should be the sole owner of Skilletts, it was irrelevant which spouse provided the money, and there was no room for the application of the presumption of advancement. Their Lordships, in reaching the same conclusion as the trial judge and the Court of Appeal, respectfully prefer the approach of the trial judge.

Counsel for the husband mounted a strong argument that it was apparent from the wife's

evidence that they were both concerned to establish a business which could ultimately be provision for their children, and he submitted that joint ownership of the business by the spouses would be more consistent with that purpose than sole ownership by the wife. There is no shorthand note of the evidence. The note made by the trial judge could not in the nature of things be a complete record of the evidence. It is not reasonable to assume that his notes contained every piece of evidence which came to his mind when it fell to him to consider his judgment. His overall impression of the evidence formed during the six weeks of the trial is more important than any analysis to be made from the wording of his notes. Their Lordships therefore see no sufficient reason to question the inference drawn by the trial judge as to the intention of the husband and his wife when she was set up in the business.

Their Lordships will accordingly dismiss the appeal and cross-appeal. There will be no order as to the costs before the Board.

Appeal and cross-appeal dismissed.

Solicitors: *Le Brasseur & Bury; Collyer-Bristow.*

BANKERS & TRADERS INSURANCE CO. LTD. v. NATIONAL INSURANCE CO. LTD.

[P.C. (Lord Scarman, Lord Brandon of Oakbrook, Lord Brightman, Lord Templeman and Sir William Douglas) February 25 & April 2, 1985]
[Privy Council Appeal No. 7 of 1984]

Insurance – Persons injured in road traffic accident – Judgment obtained against driver of car – Motor car insured with appellants by owner – Driver driving with permission of owner – Driver also covered by insurance with the respondents in respect of his own car – Whether appellants or respondents liable to satisfy judgment – Road Traffic Ordinance 1958, ss. 74, 75, 80 & 82.

Road Traffic – Insurance Policy – Which insurer liable to satisfy judgment.

In this case two persons (the third parties) suffered personal injuries when they were run into and knocked down by a motor vehicle owned by Kwang and driven with his consent by Ko. They sued Ko, the driver, and obtained judgment, which remained unsatisfied. Ko was insured under a policy of insurance issued to him by the respondents. The policy was in respect of a vehicle other than the one involved in the accident but contained an extension of cover in these terms – "The Company will indemnify... the insured whilst personally driving a private motor car... not belonging to him and not hired to him under a hire-purchase agreement".

At the time of the accident Ko was driving a private motor car belonging to Kwang. Kwang was insured with the appellants. The policy was in respect of the car which Ko was driving and it provided *inter alia* that "The Company will indemnify (a) an authorised driver who is driving the motor vehicle provided that such authorised driver..... is not entitled to indemnity under any other policy."

In the High Court Mohamed Yusoff J. held that the driver's policy provided him with cover and that upon the true construction of the Ordinance his insurers were liable to satisfy the judgment against Ko. On appeal the Federal Court took a different view and held that the insurers of the motor car were liable. They allowed the appeal of the driver's insurers and held the owner's insurers liable to satisfy the judgment against the driver – see [1983] 2 M.L.J. 105.

The appellants appealed.

Held: it is plain from the terms of the owner's policy that the owner's insurers were not on risk when the car was being driven by another person who had a policy of his own which covered him. The driver's insurers were therefore on risk at the time of the accident and not the owner's insurers. The respondents, being the driver's insurers were liable to satisfy the third party judgment against their insured.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

George Newman Q.C. (*Lee Bian Tian* with him) for the appellants.

P. Devadas for the respondents.

Cur. Adv. Vult.

Lord Scarman (delivering the Judgment of the Board): In this appeal from the Federal Court of Malaysia the issue is which of two insurance companies is liable under section 80 of the Road Traffic Ordinance (No. 49 of 1958) to satisfy a judgment obtained by a third party in respect of a road traffic accident. At the conclusion of the hearing their Lordships indicated that they would report their opinion to His Majesty the Yang di-Pertuan Agong that the appeal ought to be allowed with costs before the Board and below and that they would give their reasons later.

On June 15, 1969 Abdul Hafidz and Mohamediah bin Jali ("the third parties") suffered personal injuries in a road accident. They were run into and knocked down by a motor vehicle owned by Kwang and driven with his consent by Ko Beng Lai. They sued Ko, the driver, and on July 28, 1981 obtained judgment against him for a total sum of $44,098 and interest from the date of judg-